

**Case No. 14-60796**

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**ENTERGY MISSISSIPPI, INCORPORATED,**

**Petitioner – Cross Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD,**

**Respondent – Cross Petitioner**

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**RULE 19 SUBMISSION  
BY PETITIONER/CROSS-RESPONDENT,  
ENTERGY MISSISSIPPI, INCORPORATED,  
IN RESPONSE TO THE NATIONAL LABOR RELATIONS BOARD’S  
PROPOSED JUDGMENT**

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In response to the proposed Judgment (Doc. No. 00513329669) filed out of time by the National Labor Relations Board (“the Board”) (Doc. No. 00513329088), Entergy Mississippi, Incorporated (“Entergy”), Petitioner/Cross-Respondent, submits the following memorandum and its own proposed Judgment in accordance with Fed. R. App. P. 19 (“Rule 19”).

1. This matter involves a petition for review by Entergy and a cross-petition for enforcement of an order of the Board concerning the status of a certain group of Entergy’s employees—dispatchers—under the National Labor Relations Act, 29 U.S.C. §§ 151-169.

2. On December 7, 2015, after briefing and oral argument, this Court filed its Opinion (Doc. No. 00513297166). Although the Court ruled in the Board’s favor on certain findings and issues, the Court reversed the Board’s decision in part as follows:

There is substantial evidence to support the Board’s determination that dispatchers do not “responsibly direct” field employees or “assign” them to a “time” or “significant overall duty.” But the Board ignored evidence that arguably shows that dispatchers “assign” field employees to “locations” using “independent judgment.” We affirm in part and reverse in part the Board’s decision that dispatchers are not supervisors.

\* \* \*

The Board ignored significant portions of the record that show how dispatchers arguably exercise independent judgment when deciding how to allocate Entergy’s field workers.

\* \* \*

[T]he evidence discussed above arguably shows that dispatchers “assign” field employees to places by exercising “independent judgment.” Yet the Board ignored this evidence when explaining its reasoning. Decisions by the Board that ignore a relevant portion of the record cannot survive substantial evidence review. . . . Accordingly, we reverse the Board’s decision that dispatchers do not exercise “independent judgment” when assigning employees to locations and remand for further proceedings on this narrow question.

\* \* \*

For the reasons explained, we AFFIRM the Board’s decision in all but one respect. We REVERSE the Board’s determination that dispatchers do not “assign” field employees to “places” through the exercise of “independent judgment” and we REMAND for further proceedings. The Board cross-appeals, asking this court to enforce its order. Because we hold the Board erred, we DENY the Board’s request for enforcement.

(Doc. No. 00513297166, Slip Opinion pp. 9, 12, 14, and 16).

3. In a memorandum letter to the parties that accompanied the Court’s opinion on December 7, 2015, the Clerk wrote in pertinent part:

We are enclosing a copy of the court’s opinion issued today. A judgment has not been entered, pending receipt and settlement of the judgment provided by Fed. R. App. P. 19. After judgment is entered we will notify counsel. Fed. R. App. 40 and 41 and 5th Cir. R. 41 governing petitions for rehearing and issuance of mandates will then apply. [Emphasis in original].

(Doc. No. 00513297183).

4. Rule 19 provides that the Court will settle and direct entry of judgment after the agency and any other party file proposed judgments they believe conform to the Court's opinion:

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Fed. R. App. P. 19.

5. On January 5, 2016, after failing to comply with its mandatory 14-day deadline under Rule 19, the Board filed an unopposed motion to file a proposed Rule 19 judgment out of time. (Doc. No. 00513329088).

6. As the Board concedes in its motion, which recounts the procedural history of this case since December 7, 2015, the Board did not file a proposed judgment by the Court's December 21, 2015 deadline required under Rule 19, and the Board's proposed judgment submitted on January 5, 2016 is admittedly late.

7. As a professional courtesy to the Board in its procedural request to file its late pleading, Entergy did not oppose the Board's motion to file a proposed judgment out of time, but Entergy expressly did so without waiver or prejudice to any position that Entergy may take in connection with Rule 19.

8. As noted above, after an agency files the required proposed judgment and serves the other parties, Rule 19 specifically states that a party who disagrees with the agency's proposed judgment then can file and serve within ten days a proposed judgment that the party believes conforms to the opinion. The Court of Appeals then "will settle the judgment and direct entry without further hearing or argument."

9. Under Fed. R. App. P. 36(a)(1), "[t]he clerk must prepare, sign, and enter the judgment: (1) after receiving the court's opinion—but if settlement of the judgment form is required, after final settlement. . . ."

10. The "entry of judgment" marks the start of the 45-day period for filing a petition for *en banc* hearing under Fed. R. App. P. 35 or for panel rehearing under Fed. R. App. P. 40 in this case. Without the entry of the separate judgment, the rehearing period does not begin to run.

11. Under Fed. R. App. P. 41(b), unless the Court of Appeals shortens or lengthens the time, the court's mandate will issue seven days after the time to file a petition for rehearing expires or seven days after the entry of an order denying a timely petition for rehearing.

12. Under the foregoing rules and this Court's memorandum letter of December 7, 2015, the rehearing period in this case should begin to run from the

new date of entry of the Judgment under Rule 19, not retroactively from December 7, 2015.

13. After this Court settles the judgment under Rule 19, the Clerk enters it on the docket, and the time for rehearing begins in this case, Entergy intends to timely file a petition for rehearing on grounds that no remand of this case is required or warranted for reasons Entergy will explain in the rehearing petition, including the Board's failure to comply with Rule 19 within the 14-day deadline despite the overly extended and unduly delayed nature of this matter.

14. Consistent with Fed. R. App. P. 41(b) and the Court's memorandum letter of December 7, 2015 (Doc. No. 00513297183), Entergy further suggests that the mandate should not issue until after the forthcoming petition for rehearing is resolved.

15. Thus, as Rule 19 permits, Entergy disagrees with the Board's proposed judgment (Doc. No. 00513329669) and now submits Entergy's own proposed Judgment attached hereto, which Entergy believes best conforms to this Court's Opinion of December 7, 2015.

Respectfully submitted,

/s/ G. Phillip Shuler, III

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**CERTIFICATE OF SERVICE**

I certify that on January 8, 2016, I filed the foregoing via the Court's CM/ECF system, which will serve all counsel of record as follows:

Ms. Elizabeth Ann Heaney: [elizabeth.heaney@nlrb.gov](mailto:elizabeth.heaney@nlrb.gov)  
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/s/ G. Phillip Shuler, III

Counsel for Petitioner/Cross-Respondent



**CERTIFICATE OF COMPLIANCE**

Pursuant to 5th Cir. Rules 25.2.1 and .13, I certify that the required privacy redactions have been made; the electronic submission is an exact copy of the paper document; and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Pursuant to 5th Cir. Rule 27.4, I further certify that this document complies with the format and page limit requirements of Fed. R. App. P. 27(d)(1) & (2) because it: (i) is less than 20 pages and includes the appropriate caption and is double-spaced on 8.5-by-11 inch paper with one-inch margins on all sides; and (ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman 14-point font.

/s/ G. Phillip Shuler, III

Counsel for Petitioner/Cross-Respondent

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 14-60796

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NLRB Docket No. 15-CA-017213  
NLRB Docket No. 15-CA-018131  
NLRB Docket No. 15-CA-018136

ENTERGY MISSISSIPPI, INCORPORATED,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner

Petition for Review and Cross-Petition for Enforcement  
of an Order of the National Labor Relations Board

Before BENAVIDES, CLEMENT, and HIGGINSON, Circuit Judges

**J U D G M E N T**

This cause was considered on the petition of Entergy Mississippi, Incorporated for review of an Order of the National Labor Relations Board and on the Cross-Petition of the National Labor Relations Board for Enforcement of the aforesaid Order. The Court has heard the arguments of the parties and has considered the briefs and Agency record filed in this case.

**IT IS ORDERED AND ADJUDGED THAT:**

In conformity with this Court's Opinion filed on December 7, 2015, the Court affirms the National Labor Relations Board's determination that Entergy's dispatchers do not "responsibly direct" field employees or "assign" them to a "time" or "significant overall duty," but the Court reverses the Board's determination that the dispatchers do not "assign" field employees to "places" through the exercise of "independent judgment." Because the Court has affirmed in part and reversed in part the National Labor Relations Board's Order, the Court remands the matter for further proceedings on the narrow question of whether the dispatchers exercise independent judgment in assigning field employees to places.

**IT IS FURTHER ORDERED AND ADJUDGED THAT,** because the Board erred, the National Labor Relations Board's Cross-Petition to Enforce its Order is DENIED.

**IT IS FURTHER ORDERED THAT** each party bear its own costs on appeal.

Mandate shall issue in due course according to the time specified in Fed. R. App. P. 41(b) and 5th Cir. Rule 41.

New Orleans, Louisiana, this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

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CLERK,  
UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT